IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

STATEMENT OF CASE BY DEFENDANTS IN ERROR.

This cause is before this Court upon a writ of error sued out by Blake and Rogers, Brown & Co.

The subject matter of litigation is the assets of the insolvent Embreville Freehold Land, Iron and Railway Company, limited, amounting in value to about $100,000.00.

That company was a foreign corporation, organized under the laws of the Kingdom of Great Britain and Ireland, for mining and manufacturing purposes; but, prior to the filing of the general creditors' bill to wind it up as an insolvent corporation, it had registered its charter in Tennessee, under Tennessee Act 1877, Ch. 31, which prescribed terms upon which foreign mining and manufacturing companies might locate and carry on business in Tennessee. Under said Act that company acquired a large landed estate in Tennessee and for several years preceding insolvency conducted the business of mining and iron manufacturing, though its principal or home office was in London, England.

The fifth section of the Act of 1877, Ch. 31, is as follows:

"Section 5. That the corporations, and the property "of all corporations coming under the provisions of this "Act, shall be liable for all the debts, liabilities and en- "gagements of the said corporations, to be enforced in "the manner provided by law for the application of the "property of natural persons to the payment of their "debts, engagements and contracts. Nevertheless, cre- "ditors who may be *residents of this State* shall have a "*priority in the distribution of assets*, or subjection of the "same, or any part thereof, to the payment of debts over "all simple contract creditors *being residents of any other* "*country or countries*, and also over mortgage or judg- "ment creditors, for all debts, engagements and contracts "which were made or owing by said corporations pre- "vious to the filing and registration of said valid mort- "gages, or the rendition of such valid judgments, etc."

On November 15, 1895, the Supreme Court of Tennessee passed a decree adjudging that the Act incorporating this particular section, was not unconstitutional as contended by C. G. Blake and Rogers, Brown & Co.; that its provisions awarding priority in the distribution of assets of the insolvent corporation to creditors who resided in Tennessee, did not contravene Constitution of the United States, Article IV, Section 2, or Article XIV of the amendments to the Constitution; but held, on the contrary, that said statute was in all respects a valid enactment. The Supreme Court of Tennessee, therefore,

decree an enforcement of the preference given by said Act to residents of Tennessee over *all non-residents of that State*, including C. G. Blake, Rogers, Brown & Co., individuals residing in the State of Ohio, and the Hull Coal & Coke Co., a body corporate under the laws of Virginia, without *situs* or office in Tennessee.

C. G. Blake, Rogers, Brown & Co., and the Hull Coal & Coke Co., procured the entry of an order severing them from all other creditors standing in the class with them, and prosecuted a writ of error to this Court to have reviewed by it the decree of the Supreme Court in so far as it upheld the statutory preference to creditors who resided in Tennessee. All three of complaining creditors were represented by the same counsel and assigned the same errors.

This court, reviewing the decree of the Supreme Court of Tennessee, adjudged that it was erroneous in respect to the rights of C. G. Blake, and Rogers, Brown & Co., in that it denied them as citizens of Ohio the rights guaranteed them by Article IV, Sec. 2, of the Federal Constitution: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several States." It was held that these individual plaintiffs in error were entitled to stand upon the same plane with creditors of like class who were citizens of Tennessee, and could not be denied equality of right simply because they did not reside in that State. The decree of the State Supreme Court was, therefore, reversed in its provisions as to Blake and Rogers, Brown & Co., with costs payable by the creditors residing in Tennessee.

But, it was further held that the Hull Coal & Coke Co. was entitled to no relief under either clause of the Constitution invoked, and the final decree of the State Supreme Court as to it was affirmed with costs adjudged to be paid by that unsuccessful plaintiff in error.

Blake vs. McClung, 172 U. S. 245.

The decree passed by this Court on December 12, 1898, is here quoted, for convenience:

"The judgment of said Supreme Court of Tennessee in this cause as to the Hull Coal & Coke Co. be and the same is hereby, affirmed with costs; and as to the other plaintiffs in error be, and the same is hereby, reversed with costs; and it is further ordered that this cause be, and the same is hereby, remanded to said Supreme Court for further proceedings not inconsistent with the opinions of this Court."

A mandate, embodying the decree, issued out of this Court to the State Supreme Court, where counsel for C. G. Blake and Rogers, Brown & Co. moved in their behalf (and not for Hull Coal & Coke Co., which resisted the motion) for the entry of a decree under the mandate which would incorporate the following—quoting the draft of decree tendered by counsel with their said motion:

"That the effect and purpose of the opinion and mandate of said Supreme Court of the United States, in respect to the rights of C. G. Blake, and Rogers, Brown & Co., in whose favor an order was made reversing said

decree of the 15th day of November, 1895, is to place the said C. G. Blake, and Rogers, Brown & Co., *in the class* and upon exact equality with the Tennessee creditors in respect to the distribution of the assets of said Embreville Company among its creditors."

The Supreme Court of Tennessee declined to enter the decree so tendered, as it did not construe the opinion and mandate of this Court to mean (A) that C. G. Blake, and Rogers, Brown & Co., should enter the preferred class of creditors, and take priority of payment of the assets of the insolvent corporation over the Hull Coal & Coke Company, a Virginia corporation, Julian Kennedy, a citizen of Pennsylvania, or over the British claimants. (B) Further, that Blake, and Rogers, Brown & Co., by their writ of error, and under their assignment of errors in the Supreme Court of the United States, prevailed to the extent of having declared unconstitutional that provision of Act of 1877, which and so far as it subjected and postponed them to the satisfaction of residents of Tennessee; that the terms of the opinion, decree and mandate would be satisfied by awarding to Blake, and Rogers, Brown & Co. such pro ratas as they would have been entitled to at common law.

Opinion Tennessee Supreme Court, Tr. 4-7.

BRIEF FOR DEFENDANTS IN ERROR.

(*A*) *Is that a proper construction of the opinion, decree and mandate of this Court which would cause C. G. Blake, and Rogers, Brown & Co., to be classed with residents of Tennessee, and thus to take, by virtue of Act*

of 1877, Ch. 31, or the decree of this Court, priority over Hull Coal & Coke Co., Julian Kennedy or non-residents of Tennessee?

The claimants to the funds produced by a sale of the assets of the insolvent Embreville Company were attempted to be classed as follows by the legislation embodied in Tennessee Act 1877, Ch. 31:

(a) A *preferred class*—residents of Tennessee; and (b) a subjected or postponed class—all non-residents of Tennessee.

In the light of the rulings by this Court in this cause (Blake vs. McClung) on appeal, the claimants may be classified as follows:

(a) The class named for preference by the statute—residents of Tennessee.

(b) Individual citizens of States other than Tennessee; and herein a subdivision: (1) Prevailing or redressed citizens—Blake, and Rogers, Brown & Co., and (2) non-appealing citizens—Julian Kennedy and others.

(c) Non-resident corporations—such as Hull Coal & Coke Co.—and aliens.

There can be no doubt but that Blake, and Rogers, Brown & Co., are decreed to be entitled to the relief of being taken from the subjected class; but our insistence is that this Court did not mean to rule, that these two creditors are entitled to enter the class *preferred* by statute, and swell that class, subjecting and postponing

to the payment of their own claims, the claims of the Hull Coal & Coke Co., Julian Kennedy, and the British creditors.

The attempt of the draftsman of the decree, tendered to the Supreme Court of Tennessee for entry, was not merely to remove Blake, and Rogers, Brown & Co. from the *subjected class*, but to place them in the preferred class. Our insistence is that these citizens of Ohio should be taken from the subjected class, but that they cannot be placed in the preferred class.

The effect of the insistence of Blake, and Rogers, Brown & Co., was carried to the point of urging that the effect of the rulings of the court was to enlarge the preferred class by the admission of themselves into it with the result that all Tennessee creditors *and these two non-resident citizens* should be satisfied before anything should be paid to Hull Coal & Coke Co., Julian Kennedy, or aliens—a result that leaves *nil* for the last named.

The counsel for Blake, and Rogers, Brown & Co., in the State Court based his clients' right to the decree presented upon this isolated clause in the opinion of the Supreme Court of the United States, to-wit:

"We adjudge that when the general property and "assets of a private corporation, lawfully doing business "in a State, are in course of administration by the courts "of such State, creditors who are citizens of other States "are entitled, under the Constitution of the States, to "stand upon the same plane with creditors of like class "who are citizens of such State, and cannot be denied

"equality of right simply because they do not reside in "that State but are citizens residing in other States of "the Union. The individual plaintiffs in error were "entitled to contract with this British corporation law- "fully doing business in Tennessee, and deemed and "taken to be corporations of that State; and no rule in "the distribution of its assets among creditors could be "applied to them as resident citizens of Ohio, and because "they were not citizens of Tennessee, that was not applied "by the Courts of Tennessee to creditors of like character "who were citizens of Tennessee." 172 *U. S. Rep.*, 259.

If this clause was all of the opinion, there could be but little doubt as to the correctness of the position taken by the solicitor of C. G. Blake, and Rogers, Brown & Co. It is, however, only an isolated clause, and when it is read in the light of the balance of the opinion it does not support the claim of these parties to be placed "*in the class*" with the Tennessee creditors in respect to the distribution of the assets of said corporation among its creditors, *and thereby obtain an unwarranted priority of payment* over the Hull Coal & Coke Co., Julian Kennedy, and the aliens.

THIS PRIORITY NOT WARRANTED BY THE STATUTE.

The Act of 1877 does not give, or purport to give, citizens of other States of the Union who are non-residents of the State of Tennessee the right of priority of payment over non-resident corporations, non-appealing citizens and alien creditors. The priority given by this statute is in favor of residents of Tennessee *alone*. The

court evidently did not mean to enlarge this class, by making the statute read that "residents of Tennessee *and individual creditors of other States of the Union* shall have priority over aliens, non-resident corporations, etc." That would be to assume the function of the State Legislature, or to reform the statute to speak a meaning the Legislature never intended.

A calculation serves to make clearer how indefensible is this position of Blake, and Rogers, Brown & Co.: The assets to be distributed amount, in round numbers, to $100,000,00. The claims of residents of Tennessee amount to, say, $87,000.00, at this date. This would leave $13,000.00 to be distributed under the classification and rule laid down by Act 1877; that is, to be divided among the members of the subjected class; to-wit: Blake, Rogers, Brown & Co., aliens, non-resident corporations, etc. The claims of Blake, and Rogers, Brown & Co., amount to, say, $33,000.00 at this date; and the claims of all other non-residents of Tennessee, likely to be proven, amount to, say, $480,000.00 (for purpose of illustration). *All* claims of non-residents aggregate about $513,000.00, and to all these non-residents there would be going (on the statutory basis) the $13,000.00 balance left after satisfying the residents of Tennessee. Thus, under a distribution made under the statute, Blake, and Rogers, Brown & Co. would have received a pro rata of 2½ cents on the dollar.

But under the decree of the Supreme Court of the United States, Blake, and Rogers, Brown & Co., are taken from the subjected class, leaving as the only

creditors subjected to the preferred class the aliens and other non-appealing and unredressed non-residents, such as Julian Kennedy; and the distribution should be as follows: Divide the $100,000.00 of assets between *all* creditors, share and share alike according to the amount of their respective claims. All claims, above given, aggregate $600,000.00. This gives to each creditor 16⅔ cents on the dollar. Blake, and Rogers, Brown & Co., by their writ of error, get this measure of relief—an increase of pro rata from 2½ cents to 16⅔ cents on the dollar.

The amount going to aliens and other unredressed non-resident creditors (on their claims aggregating $480,000.00) would be $80,000.00. The amount going to residents of Tennessee on their claims aggregating $87,000.00 would, on pro rata of 16⅔ cents, be $14,500.00, leaving them lacking $72,500.00 to pay them in full. Therefore, the aliens and non-residents (not including Blake, and Rogers, Brown & Co.) contend that they have a right to satisfy the terms of the statute by paying out of the $80,000.00, pro rated to them on their demand, this $72,500.00 required to pay in full residents of Tennessee. *Thus the aliens would have left $7,500.00.* If we assume that the claims, proven and to be proven, by aliens and non-residents other than Blake, and Rogers, Brown & Co. would exceed $480,000.00 then the sum thus left to them would be increased beyond $7.500.00.

The contention of Blake, and Rogers, Brown & Co., if allowed as the correct construction of the decree and

mandate of this Court, would result in adding to the $87,000.00 of Tennessee residents' claims, their two claims aggregating $33,000.00, making a grand aggregate of $120,000.00 entitled to be paid in full out of the $100,000.00 of assets, thus giving to Tennessee claimants and to Blake, and Rogers, Brown & Co. eighty cents on the dollar, *and leaving Hull Coal & Coke Co., Julian Kennedy, and all in like attitude, and the aliens more than $20,000.00 distant from the assets.*

It is earnestly contended in behalf of the last named that this result cannot come *by virtue of anything in the Tennessee Act, 1877, Ch. 31.* After satisfying the requirements of that Act, these claimants may yet retain the balance of their pro ratas so far as the *statute* affects their rights. Blake, and Rogers, Brown & Co., assail the preference granted by this Act as unconstitutional; they now seek to enforce the same preference in their own favor against Hull Coal & Coke Co., and others.

THIS PRIORITY OF BLAKE NOT WARRANTED BY DECREE OF NOVEMBER 15, 1895.

The decree of the Supreme Court of Tennessee, of date November 15, 1895, declares that the *Tennessee creditors* shall have the right of priority of payment over all the other creditors of the Embreville Company out of its assets, and that after the Tennessee creditors have been paid in full the balance of the assets shall be distributed ratably between Rogers, Brown & Co., C. G. Blake, the Hull Coal & Coke Co., Julian Kennedy,

and the English creditors, *without preference or priority in favor of any of them.* (*Blake vs. McClung*, 172 *U. S.* 275.) It is clear, therefore, that Rogers, Brown & Co., and C. G. Blake, cannot claim priority over the Hull Coal & Coke Co., Julian Kennedy, and the English creditors under or *by virtue of the decree of the Supreme Court of the State of Tennessee.*

PRIORITY OF BLAKE OVER NON-RESIDENT NOT WARRANTED BY DECREE OF THIS COURT.

This Court when it came to consider the cause on writ of error to the above decree of the Tennessee Supreme Court, had before it an adjudication that a *fixed amount;* to-wit: the sums due to residents of Tennessee, $87,000.00, should be paid before any non-resident of Tennessee should have resort to the assets. Where in its opinion or decree is there to be found an intimation that this sum should be increased for any reason? Where in the assignment of errors relied upon by Blake, and Rogers, Brown & Co., is there to be found any claim that the $87,000.00 of perferred claims should be $120,000.00? The argument of plaintiffs in error in *Blake vs. McClung* was, rather, directed against the validity of any preference as between claim.

Test from Standpoint of Hull Coal & Coke Company. —The insistence of Blake, and Rogers, Brown & Co., now being combatted; goes to the extent of exhausting the assets for the benefit of Blake, and Rogers, Brown & Co., and denying to their former associate plaintiff in

error the Hull Coal & Coke Co., against its protest, any share in the remainder left after satisfaction of the sum required by the statute—$87,000.00. We have seen that the Legislature did not by its enactment, mean through it to give to Blake a priority over the Hull Coal & Coke Co. Can it be said that this statute, without so intending it, avails, by reason of the unconstitutionality of one of its phases, to give 80 cents on the dollar to Blake, whereas without the statute and on a common law basis he would have received but 16⅔ cents;—that without the statute, the Hull Coal & Coke Co., is entitled to 16⅔ cents, and yet under the statute, after satisfying the terms of the statute in paying Tennessee creditors in full, this corporation can be called upon to yield further to Blake, and Rogers, Brown & Co., its portion of the remnant of $7,500.00? It cannot be argued that the Hull Coal & Coke Company must lose such portion because it failed to follow up and assert its rights—constitutional, statutory or common law. That Company was equal in diligence with Blake, and Rogers, Brown & Co. It joined them in the writ of error, whatever errors they assigned were at the same time assigned by it, every argument made in their behalf was made for it as well. Both together inveighed against the preference prescribed by statute, but the Hull Coal & Coke Co. now finds that preference claimed by its former co-plaintiffs *against it*, and is confronted with an argument that when it, the Hull Coal & Coke Co. appealed from the decree of the Supreme Court of Tennessee to this Court, asking for a fuller measure of relief than was

there granted it, it lost the portion that was preserved to it by the decree appealed from.

Test from Standpoint of Julian Kennedy.—May Julian Kennedy, a creditor who is a citizen of Pennsylvania (Tr. 16, 141, p. 46), standing on the very same plane as to privileges and immunities with Blake, and Rogers, Brown & Co. after he has exercised his volition not to complain of the decree of November 15, 1895, and to submit to a satisfaction of the demand of the statute, be made to stand and see the remainder of his pro rata go to Blake, and Rogers, Brown & Co.? Can Blake claim that he shares with residents of Tennessee in such a manner as to *subject* Kennedy to the satisfaction of his, Blake's claim? Such contention in Blake's behalf, if adopted and enforced, would cause the decree of this Court to give priority of satisfaction to a citizen of Ohio (Blake) over a citizen of Pennsylvania (Kennedy) while denying the right of priority of a citizen of Tennessee over that same citizen of Ohio.

Test from Standpoint of Aliens.—Respecting the rights of the aliens, this Court said in its opinion: "What may be the effect of the judgment of this Court in the present case upon the rights of creditors not residing in the United States, it is not necessary to decide. Those creditors are not before the Court on this writ of error." It would seem, therefore, that this Court did not intend to disturb the decree of the Supreme Court of Tennessee in respect to the alien creditors. Certain it is there was no error assigned in *Blake vs. McClung* that would have

called this Court to decide whether or not the aliens would lose to Blake, and Rogers, Brown & Co., their interest in the $7,500.00 remainder; neither the appeal nor any assignment of error was directed against the aliens, who may rely upon the principle of *res adjudicata* to protect the rights decreed them by the decree of November 15, 1895.

(B) *May C. C. Blake, and Rogers, Brown & Co. complain of a decree which, while giving them their common law rights, yet postpones aliens and non-resident corporations to the prior payment of residents of Tennessee.*

We submit that the only point adjudged by this Court in the decree disposing of the writ of error sued out in *Blake vs. McClung* was this: that the individual plaintiffs in error could not constitutionally be postponed until after the residents of Tennessee were paid in full. Under the latest decree of the Supreme Court of Tennessee they are not postponed, but are given the same plane as residents of Tennessee in a broad distribution of the assets.

"May a State exclude citizens of other States from such distribution until the claims of its own citizens shall have been first satisfied? In the administration of the property of an insolvent foreign corporation will the Constitution of the United States permit discrimination against individual creditors of such corporation because of their being citizens of other States, and not citizens of the State in which administration occurs? These questions are presented for our determination."

Blake vs. McClung, 172 U. S. 247.

RIGHTS GUARANTEED ARE COMMON LAW RIGHTS.

It would seem that if Blake, and Rogers, Brown & Co., are granted every right and privilege they would have had at common law, or had the Act 1877, never been passed, they cannot complain that others have been denied like right.

"The Constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one State in a condition of alienage when asserting in another State *the rights that commonly appertain* to those who are a part of the political community known as the People of the United States."

Blake vs. McClung, 172 U. S. 256.

CONSTITUTIONALITY OF PREFERENCE OVER NON-CITIZENS ESTABLISHED.

This Court, upon the errors assigned by a non-resident corporation, held constitutional that the preference awarded by Act 1877, Ch. 31, to residents of Tennessee over such non-citizens, and affirmed the decree of the State Supreme Court in respect of that claim. By what authority must the only members of the class thus preferred over non-citizens by statute, which preference is sustained as constitutional, lose it or have it impaired?

TENNESSEANS HAVE RIGHTS SECURED TO THEM BY DOCTRINE OF RES ADJUDICATA.

The same results for creditors who reside in Tennessee, and for non-citizens who reside outside of Tennessee may be worked out through the doctrine of *res adjudicata*:

Had Blake, and Rogers, Brown & Co. not prosecuted their writ of error to the Supreme Court of the United States, the decree of the State Supreme Court would have been left in irrevocable force, giving priority to residents of Tennessee over (1) Blake, and Rogers, Brown & Co., and (2) all other non-resident American and British creditors. By their writ of error Blake, and Rogers, Brown & Co., succeeded in reversing that portion of the decree of November 15, 1895, which provided that they should be postponed to Tennessee creditors, but the plain import of the opinion and decree of this Court is to leave the decree of November 15, 1895, unchanged in so far as residents of Tennessee were granted priority over class (2) *supra:* all other non-residents.

Engraft upon the decree of November 15, 1895, the decree of this Court, and the result will be that the decree of November 15, 1895, is effective to give priority over class (2): all other non-residents, to residents of Tennessee and to them alone.

Test by claim of Julian Kennedy.—As we have seen Julian Kennedy is a creditor who resides in Pennsylvania, recovering judgment on a claim above $5,000.00. Clearly Julian Kennedy would have been given the same measure of relief that this court gave to C. G. Blake, had he prosecuted a writ of error. He, however, elected to acquiesce in the decree of the State Court, allowing it to remain in full force, and he declined to join in the writ of error; submitting to severance to that end. (Tr. 16, 141, pp. 70-71.) This clearly left his

claim *postponed by final decree* to the prior satisfaction of residents of Tennessee. This postponement now appears to have been unconstitutional, but the preference has passed into *res adjudicata*. Tennessee residents do not hold this preference constitutionally, but in the face of the constitutional clause which Kennedy might have invoked. By what right may C. G. Blake share with residents of Tennessee this right of priority over Kennedy which they gain solely under the doctrine of *res adjudicata*. Had Kennedy joined Blake in the prosecution of the writ of error, Blake would not have benefited one cent thereby. But Kennedy did not appeal, and we fail to see how Blake can be the beneficiary of his failure; but we conceive on the contrary that the decree of the State Supreme Court availed to give residents of Tennessee alone the benefit of such election on the part of Kennedy.

Test by claim of Hull Coal & Coke Company.—As we have already seen the decree of the State Supreme Court as to the Hull Coal & Coke Company was not reversed, not modified, but affirmed with costs. The decree of that Court of date November 15, 1895, provided that residents of Tennessee, and not others, should have the benefit of priority of the $87,000.00 in amount, as aforesaid, over this unsuccessful plaintiff in error, the Hull Coal & Coke Co.

Test by claims of aliens.—The alien creditors did not join in the writ of error. Therefore, it would seem that they are left in the same position in all respects with Julian Kennedy. This Court declined to pass upon their

rights, upon hypotheses of appeal and non-appeal by them. This left the provisions of decree of November 15, 1895, touching their claims unaffected by the decree of this Court. If we were to assume an appeal by the aliens, then we also assume that this Court would have decreed thereon either (1) that they were non-citizens and classable with the Hull Coal & Coke Co., and affirmed the decree as to their claims in manner above indicated; or (2) that they were entitled to constitutional protection along with Blake. In neither event would Blake be a beneficiary of the appeal by aliens. How then may Blake benefit by their failure to appeal?

But this Court was yet more specific in its ruling touching the claims of aliens: "What may be the effect of the judgment of this Court in the present case upon the rights of creditors not residing in the United States, it is not necessary to decide. Those creditors are not before the Court on this writ of error."

If this Court either forbore or failed to adjudge as to this point, is not the decree of November 15, 1895, left in full force in respect thereof, in all of its provisions?

NO CONSIDERATION OF NEW QUESTIONS OR CHANGE OF DECREE AT THIS STAGE.

If the court did not actually pass upon the question of Blake's right to share with residents of Tennessee their rights by reason of *res adjudicata* against the Hull Coal & Coke Co., or against Julian Kennedy, or, again, if the Court did not take into judgment the right of Blake

to enter the preferred class, so as to enlarge it and thereby submerge the claims of Hull Coal & Coke Co., and all unredressed non-residents, then the Court would not now consider same or any change in the decree as passed.

Hill vs. Chicago, etc., R. R. Co., 140 U. S. 52.

This is true even where there is a second appeal in a cause.

Northern Pacific Co. vs. Ellis, 143 U. S. 52;
Great Western Tel. Co. vs. Burnham, 162 U. S. 339, and cases therein cited.

The principle of *res adjudicata* on a second appeal of the same cause applies to all questions which might have been decided as materially involved, whether actually decided or not.

2 Enc. Pl. & Pr. 380, and cases cited.

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